A PROBLEM AS TO RATIFICATION.

IF a person whom I have not authorized to act as my agent has made in my name with a third person a contract composed of mutual promises, and if the third person, who originally believed in the authority of the assumed agent, has withdrawn from the transaction and has communicated his withdrawal to the assumed agent or to me, can I, nevertheless, thereafter, promptly upon learning of the contract, ratify the contract and hold the third person? In short, by ratifying an unauthorized bilateral contract can I hold the adverse party, although he has already withdrawn from the contract?

The questions underlying the problem go to the very foundation of the doctrine of ratification; and hence the problem, whether it arises often or not, seems worthy of discussion. Another reason for discussion is that, as to the solution, lawyers have held, and still hold, divergent opinions. To reconcile the opinions, or even to prove by undisputed argument that some one solution is theoretically correct, must be recognized as an impossible task, simply because of the absence of conceded elementary principles. Yet Agency, it should be remembered, is not a new branch of law, and ratification, as a mode of creating liabilities in Agency, is so old that cases are found in the Year-Books, and even earlier.[1]

In dealing with this problem, as with any other as to ratification, one first instinctively turns to the familiar and ancient maxim to the effect that ratification relates back, and is thereupon analogous or equivalent to original authorization. Bracton, obviously following language used by the Roman lawyers,[2] says: "Ratihabitio in hoc casu comparatur mandato."[3] In a case decided in 1302 it is said: "Ratihabitio retro trahitur et mandato comparatur."[4] Coke

[1] See, for example, a case decided in 23 H. VIII. (1238–9), reported in Bracton's Note Book (edited by Maitland), pl. 1243.

[2] In the Digest, lib. 43, tit. 16, l. 1, § 14, Ulpian speaks of Sabinus and Cassius, "qui rati habitionem mandato comparant," and says "rectius enim dicitur, in maleficio ratihabitionem mandato comparari." Again, in lib. 46, tit. 3, l. 12, § 4, Ulpian says: "Rati enim habitio mandato comparatur." And see Story on Agency, § 239.

[3] Bracton de Legibus, f. 171 b.

[4] Dean and Chapter of Exeter *v.* Serle de Lanlarazon, Y. B. 30 Ed. I. (edited by Horwood in the Rolls Series), 126, 129.

says: "Omnis ratihabitio retro trahitur et mandato æquiparatur."[1] "Comparatur" and "æquiparatur" are certainly not quite synonymous; but it seems that changes in language do not necessarily indicate a difference in doctrine,[2] nor even an attempt to secure greater accuracy. Bracton, Coke, and all the lawyers of the three centuries separating them used Latin in their profession as almost a living language. In that state of facts, to substitute one Latin word for another, or to add a word here and there, was easy and natural; and perhaps this is the reason why paraphase rather than quotation is common in the early books.

The several forms of the maxim, substantially identical in language and precisely identical in spirit, have been used so long as to make it certain that they are accurate descriptions of the general effect of ratification. Unquestionably ratification and original authorization are similar; and unquestionably ratification, unless some rule prevents it from having efficacy, relates back, and is thereupon substantially equivalent to original authorization. Yet there are many instances where ratification is wholly inefficacious, where relation does not take place, and where ratification and original authorization turn out to be very different things indeed. Of course too much must not be expected from any maxim. The whole law cannot be compressed into a sentence. In this particular instance the maxim carries upon its very face a warning to those who would use it as an infallible panacea. When a maxim says that two actually distinct things are equivalent, it obviously represents simply an approximation to accuracy; and when it lays down as an invariable rule a doctrine of relation, it gives emphatic notice that in many cases the solution prescribed by the rule must be disregarded. Hence, it is not at all strange that the ancient maxim as to ratification gives for many problems inadequate solutions or none at all, and that it has had to receive elaborate appendices defining the cases in which ratification is possible. One of these supplemental rules is that ratification is impossible if, meanwhile, rights of strangers have intervened;[3] and apparently this is true whether such strangers did or did not know of the original transaction.[4] A

[1] Co. Lit. 207 a.

[2] An opposite view is expressed by Mr. Justice Holmes, in 5 HARVARD LAW REVIEW, 12.

[3] Bird *v.* Brown, 4 Exch. 786 (1850); Pollock *v.* Cohen, 32 Ohio St. 514 (1877).

[4] This seems a fair inference from Wood *v.* M'Cain, 7 Ala. 800 (1845), Taylor *v.* Robinson, 14 Cal. 396 (1859), and the cases in the preceding note; but see, *contra*, Wharton on Agency, § 80. It may be of importance to inquire whether the stranger was simply acting maliciously. Bowen *v.* Hall, 6 Q. B. D. 333 (1881).

second is that ratification is incapable of giving rights against the third person if the unauthorized act, for example a notice to quit, called upon him to do some act which, in the absence of authority on the part of the assumed agent, would be unnecessary, — in short to do something promptly, in reliance upon ultimate ratification.[1] A third is that ratification is impossible if the assumed agent and the third person have meanwhile agreed to cancel the unauthorized transaction.[2] These supplemental rules indicate that, though in legal theory a ratification causes a relation back to the time of the original transaction and vivifies the original transaction throughout the whole intervening time, it is quite impossible to ignore the actual facts as to the temporary unenforceability of the transaction and as to the vast and controlling effect of the ultimate ratification. In short, these supplemental rules indicate that the enforceability of the transaction really arises at the time of the ratification, and is incapable of arising then if absurd or unjust results would follow.

The first supplemental rule stated above indicates that ratification will not be permitted to work injustice toward strangers. The second indicates that, pending ratification, even the third person, in some cases at least, may disregard the possibility of the assumed principal's eventually wishing to adopt the act of the unauthorized agent, and that here also ratification will not be permitted to work injustice. It may be suggested that in this second rule there is an intimation that ratification demands the concurrence of the principal and of the third person; but the fact is that the second rule is always conceived to be a mere application of a general principle that the doctrine of relation, being a fiction, must be disregarded whenever injustice would otherwise result. The third rule appears to be the most interesting of all. It is obviously not based upon a doctrine that an authorized agent making a contract has actual or apparent authority to cancel the contract; for there is no such doctrine. Is it based upon a doctrine that an unauthorized agent has a wider actual or apparent authority over the contract than an authorized agent would have? Apparently not; and apparently the underlying theory is not that the unauthorized agent has rights deserving protection; for though his unauthorized act, if

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[1] Right *d.* Fisher *v.* Cuthell, 5 East, 491 (1804). If the third person does the act, it seems that ratification will have full effect.

[2] Walter *v.* James, L. R. 6 Ex. 124 (1871).

never ratified, may make him liable to an action in case he really misled the third person, that liability was deliberately incurred by the unauthorized agent, and there seems no reason why the law should in his interest create an exception to even so elastic a fiction as the doctrine of relation. The real principle underlying this third rule seems to be that the third person is entitled to protect himself against the uncertainty as to ratification. The third rule, therefore, seems to rest upon the same basis as the second, — the right of the third person to insist that the doctrine of relation shall not do him an injustice. It goes much further than the second rule, however; for it permits the third person, co-operating with the unauthorized agent, to cancel a transaction to which he actually assented; and obviously it goes further than the first rule, which simply protects strangers. Thus it seems that the third rule really rests upon a doctrine of its own, a doctrine that, though an unauthorized agent cannot be said to have power to cancel the transaction, and though the third person cannot disregard the transaction silently as if he were a stranger, the third person can withdraw his assent to the original transaction by communicating such withdrawal to the person with whom the original transaction actually was had, and this withdrawal entitles the third person thereafter to treat the transaction as a nullity and to insist that a ratification would do him an injustice.

It is already obvious that the maxim *ratihabitio retro trahitur* does not cover the whole ground. Indeed, it ought to be noticed that the maxim does not purport to indicate in what cases ratification is capable of taking place. It simply states that, if ratification does take place, it relates back and thereupon leads to results resembling those flowing from original authorization. To supplemental rules, several of which have been stated above, is left the designation of the instances in which ratification is possible. The general principles underlying possibility of ratification appear to be that the transaction in fact does not have full validity until there is ratification, and that this fact must be borne in mind in each individual case, and that in each case the question is whether in the light of this actual fact ratification would lead to absurd or unjust results. These general principles, and the more specific rules underlying them, cast interesting and valuable, though not adequate, light upon the general question as to the nature of an unauthorized contract in the time succeeding apparent formation and preceding ratification. Upon that general question there is no occasion

now to enter, save in so far as it bears upon the problem stated at the beginning of this article.

As furnishing solutions of this problem several theories can be advanced; and these will now be discussed.

The first theory is the one for which the chief authority is Dodge *v.* Hopkins,[1] a case decided by the Supreme Court of Wisconsin in 1861. In that case the doctrine of the court, as explained in the opinion, was that, as the principal's actual assent is not contained in the original transaction, the adverse party is not then bound; that consequently the original transaction is wholly nugatory; that consequently a ratification by the principal will not give him rights unless subsequently assented to by the adverse party.[2] To this line of argument there are obvious objections. To take the last point first, it seems more natural to say that the adverse party assented originally, did not withdraw his assent before ratification, was capable of assenting then, and consequently must be taken to have assented still. Again, the assumption that an originally unauthorized transaction entered into in the name of a principal is, as between that principal and the adverse party, a mere nullity, seems to do away with the whole doctrine of ratification. Ratification cannot, even with the aid of a doctrine of relation, render that effective which was once a mere nullity. If the original transaction was a nullity, and if the assent of the adverse party must be obtained again, and if the effect of the ratification and of the renewed assent is to make a binding contract, it seems that the real con-

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[1] 14 Wis. 630. The case is followed in Atlee *v.* Bartholomew, 69 Wis. 43 (1887). The doctrine is attacked in an editorial note in 5 Am. St. Rep. 109. That note is answered in an article by F. R. Mechem in 24 Am. L. Rev. 580; and to the latter discussion there is a reply by F. A. Sondley in 25 Am. L. Rev. 74.

[2] Dixon, C. J., delivering the opinion of the court, said: "It is very clear . . . that the plaintiff was not bound by the contract and that he was at liberty to repudiate it at any time before it had actually received his sanction Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual — those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound, — that each should execute the instrument so that the other could set it up as a binding contract against him . . . from the moment of its execution. In such cases it is well settled . . . that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. . . . The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party who has neglected to execute it can render it obligatory upon the party who did execute, without his assent."

tract is a new one, and is not the old transaction; for though the old transaction supplies the terms, the new one alone supplies the assent of each of the parties. The doctrine of ratification, according to this theory, seems to disappear.[1] As indicating the court's point of view, and also as diminishing materially the force of Dodge *v.* Hopkins as an authority, it should be noticed that the only cases upon which the court relied are cases in which an actually authorized agent and an adverse party entered into a contract under seal, which, though conceded to be within the agent's authority, failed to bind the principal because it was expressed and signed in such way as not to make the principal an actual party to the contract.[2] In those cases it was necessarily held that the original contract failed to bind the principal; that, as it obviously contemplated mutual promises binding the principal and the third person to each other, it also failed to bind the third person; that consequently it was wholly invalid; and that it was incapable of becoming valid as against the third person through the mere subsequent assent of the principal.[3] To call subsequent assent in such a case a ratification is clearly a misnomer; for the contemplated contract was, or by the court was assumed to be, fully within the agent's authority, and hence the defect was in the contract itself and not in the agent. No one supposes that a ratification is more efficient than an original authorization, nor that it can change the force given by law to certain forms of language and of signature. The cases cited in Dodge *v.* Hopkins, therefore, do not sustain the decision, but do show clearly that, as between an assumed principal and the third person, the court considered an unauthorized transaction wholly nugatory. Such a conception cannot lead to good results. An argument based upon it either proves too much or proves nothing at all. The logical conclusion ought to be that an entirely new contract is necessary, and that hence there is no

[1] For ratification is neither a contract nor an estoppel, but a mere election. Commercial Bank *v.* Warren, 15 N. Y. 577 (1857); Forsyth *v.* Day, 46 Me. 176, 194–197 (1858); Metcalf *v.* Williams, 144 Mass. 452, 454 (1887). A possible explanation of Dodge *v.* Hopkins is that the court may have assumed that a ratification requires either a consideration or the elements of an estoppel.

[2] Townsend *v.* Corning, 23 Wend. 435 (1840); Townsend *v.* Hubbard, 4 Hill, 351 (1842).

[3] Nor could it have become valid if the third person had assented to the so-called ratification. It might be that such so-called ratification and such assent could be taken together as making a contract; but that would be a new contract, and would not by relation cause the old transaction to have efficacy.

doctrine of ratification. Yet there is a doctrine of ratification; and transactions which, as between the principal and the third person, were originally not of full validity, because of lack of authority, are the very transactions for which the doctrine of ratification was created, and to which alone it is applicable. Indeed, in the opinion in Dodge *v.* Hopkins it was conceded that a ratification does cause an unauthorized contract, though contemplating mutual promises, to become binding upon the ratifier. This concession, even when supported on the ground that the adverse party by choosing to accept the ratification makes the ratification mutual, seems fatal to the principal doctrine of the case. There is no rule to the effect that the adverse party, in order to profit by a ratification, must promptly assent to it, nor that after ratification and before assent by the adverse party the principal may withdraw, nor even that the adverse party must know of the ratification. Hence it seems that the validity of a ratification as against the ratifier depends upon the ratifier alone. Yet if his ratification makes good the promise originally made in his behalf by the unauthorized agent, it seems to make good at the same instant the counter-promise for which that promise was the consideration. Whether this reasoning be approved or not, it is admitted on all sides that a ratification, if assented to, makes the original contract binding upon both parties as of the time of the original transaction; and this result seems to prove the untruthfulness of the assumption that the original transaction is wholly nugatory and the doubtfulness of the conclusion that a new assent is necessary. The truth seems to be that the original transaction cannot be disregarded entirely; that it is at least efficacious to the extent of supplying evidence of the assent of the third person; that in the absence of withdrawal of that assent a new assent is unnecessary; and that consequently the doctrine of Dodge *v.* Hopkins is unsatisfactory. The sound and useful features of Dodge *v.* Hopkins appear to be the tacit assumptions that a contract, even if made through an unauthorized agent, cannot become binding upon either party in interest unless at some one moment there is actually or theoretically an expression of assent by each, and that the doctrine of relation cannot be applied unless this elementary requirement of the law of Contracts is fulfilled.[1]

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[1] An authority for these tacit assumptions is Walter *v.* James, L. R. 6 Ex. 124 (1871), cited above.

A second theory[1] is that the third person's assent to the original transaction is simply an offer, contemplating ultimate acceptance by the principal, that ratification is such acceptance, and that, if the third person withdraws his assent before ratification, there never is mutual assent. This theory, of course, answers the problem in the negative. There are obvious objections to saying that the third person's share in the original transaction must be treated as simply an offer. If it be simply an offer, and if the only acceptance be ratification, the transaction will become incapable of ratification if the assumed agent does not within a reasonable time communicate the facts to the principal and secure a ratification; but there really is no rule to this effect, and even if the transaction should be concealed from the principal for years, there is no reason why he cannot at last ratify it. An unexcepted offer expires if not accepted within a reasonable time after communication, for the reason that an offerer asks for an acceptance; but the adverse party assenting to the original transaction now being discussed, in so far as the assent is an offer, asks for no acceptance beyond the assumed agent's assent, and upon getting that acceptance the adverse party ceases to look forward to anything but performance. In other words, in the case of a mere offer, the offerer knows there is no contract until acceptance, and if within a reasonable time there is no acceptance, he infers there is no contract, and acts accordingly, and hence there is normally an intention that an offer shall expire within a reasonable time; but a person who makes a contract with an assumed agent, by him supposed to be authorized, conceives himself to have actually entered into a contract, is expecting no further acceptance, but wishes and understands himself to be bound already. Besides, there is no question that when the ratification comes it makes a contract, not as of the date of the ratification, but as of the date of the original apparent mutual assent, and that in this sense, at least, the original transaction cannot be considered as a mere offer. For all these reasons this second theory appears to be objectionable.

A third theory[2] is that the original transaction includes both offer and acceptance, and creates a valid contract, but that the performance of the contract is conditional. The imagined condition may be a provision that the contract is not to be performed if

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[1] Suggested in the editorial note in 5 Am. St. Rep. 109.

[2] Suggested in 5 Law Q. R. 440.

there is no ratification, or that it is not to be performed if, before the assumed principal ratifies, the third person withdraws; and the proposed problem will be answered in the affirmative under the former condition, and in the negative under the latter. A sufficient answer to this theory is that it is contrary to the facts. The assumed agent and the third person contract absolutely and upon the assumption of authority. The assumed agent, if, as is taken for granted in the problem, he is believed to have authority, represents that the contract is subject to no condition as to ratification. The third person believes the representation. Hence arises the right of action against the assumed agent in case the false pretence of authority ultimately causes the third person harm.

A fourth theory, as different from the theory of Dodge *v.* Hopkins as can be imagined, is developed in Bolton Partners *v.* Lambert,[1] a case decided by the English Court of Appeal in 1889. The theory is in effect that by reason of the doctrine of relation the original transaction, though not binding the assumed principal until ratification, does from the beginning bind the third person. The consequence is that the problem is answered in the affirmative. If the maxim to the effect that ratification is equivalent to original authorization be accepted as a full statement of the law, the doctrine of Bolton Partners *v.* Lambert seems to result; and in this sense the doctrine of the case tends to make the law of ratification symmetrical.. Yet it has already been pointed out that the maxim is subject to exceptions or explanations, and that by reason of these limitations the fiction of relation is applicable only in so far as justice is not defeated thereby. It seems that in Bolton Partners *v.* Lambert the court laid too much stress upon the maxim,[2] which at most tells what is the effect of ratification when

[1] 41 Ch. D. 295. Approved by the Court of Appeal in *In re* Portuguese Consolidated Copper Mines, 45 Ch. D. 16 (1890), where the point was really unnecessary. In that case North, J., sitting in the Chancery Division, criticised Bolton Partners *v.* Lambert; and in the Court of Appeal, Lindley, L. J., said: "Then it is said that the fact that the contract was made by persons without authority makes it void. . . . That was the very point urged in Bolton Partners *v.* Lambert; but the court repudiated it, and said: 'No, it is voidable at the option of the principal; he can avoid it if he likes; he can elect to stand upon it if he likes.'" This explanation of the case resembles the third theory discussed in the text; but it is not the explanation given in the case itself, as appears in the next note. Bolton Partners *v.* Lambert is criticised in 5 Law Q. Rev. 440, and in Fry on Specific Performance (3d ed.), 711–713.

[2] Thus Cotton, L. J., said: "The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had authority to do the act

it is conceded that ratification does have some effect, and too little stress upon the rules indicating when ratification is, and when it is not, admissible.[1] When the result of permitting ratification is, as it was in Bolton Partners *v.* Lambert, to allow the unbound principal time to profit by developments in the market, while the adverse party is bound *ab initio* and has no power to withdraw from the unexpectedly unequal transaction, the result is so unjust as to make this an unfit place for applying the doctrine of relation.

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at the time the act was done by him. . . . I think the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shown that Scratchley had authority to bind the company. If that were not shown, there would be no contract on the part of the company; but when, and as soon as authority was given to Scratchley to bind the company, the authority was thrown back to the time when the act was done by Scratchley, and prevented the defendant withdrawing his offer, because it was then no longer an offer but a binding contract." And Lindley, L. J., said: "It is not a question whether a mere offer can be withdrawn, but the question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not then been so authorized, there can or can not be a withdrawal of the offer before the ratification of the acceptance. I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view, on the contrary, appears to be that the doctrine as to the retrospective action of ratification is applicable. If we look at Mr. Brice's argument closely it will be found to turn on this,—that the acceptance was a nullity, and unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. . . . I see no reason to take this case out of the application of the general principle as to ratification." And Lopes, L. J., said: "It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant's offer had no authority to act for the plaintiffs. Directly Scratchley on behalf and in the name of the plaintiffs accepted the defendant's offer, I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority. The plaintiffs subsequently did adopt the contract, and thereby recognized the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it. If Scratchley had acted under a precedent authority the withdrawal of the offer by the defendant would have been inoperative, and it is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect."

The criticism made by North, J., referred to in the preceding note, was: "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the mean time will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser."

[1] It seems, for example, that too little attention was given to the doctrine of Walter *v.* James, L. R. 6 Ex. 124 (1871), cited in this article as an authority for the third rule supplementing the maxim as to ratification.

Bolton Partners *v.* Lambert has performed a good service by emphasizing the fact that the original transaction is not a mere nullity and that neither the offer nor the acceptance contained in it can be utterly disregarded; but the case seems to have gone much too far; for in reality the contract first becomes binding when the ratification takes effect, and though thereupon the doctrine of relation normally applies, the appeal cannot be made to the doctrine of relation without first meeting the question whether at that time the parties expressly or impliedly assent, and whether under the circumstances ratification and relation will lead to absurd or unjust results. This is one of the places where the law consciously takes cognizance of convenience and justice, and does not permit its usually convenient fictions to be carried too far. Therefore it is unnecessary to dwell upon the fact that Bolton Partners *v.* Lambert appears to depart from the requirements of the law of Contracts as to mutual assent much more widely than the peculiarities of the law of Agency require; and it is enough to point out that after the third person has clearly withdrawn his original assent, it is an obvious and unnecessary hardship to hold him bound, in expectation of possible ratification, to a still unbound principal. Nor does it seem an adequate answer to say that, in case the unbound principal eventually learns of the contract and refuses to ratify it, the third person may have a remedy against the assumed agent.

Doubtless other objections can be urged against the theories that have been discussed; and doubtless, as was admitted at the outset, it is impossible to suggest a theory that will be free from objection. Yet the person who adversely criticises past theories is under a duty to attempt to present a theory that shall avoid some of the objections pointed out by him. Hence, though with great diffidence, a fifth theory is suggested, namely, that the original transaction does not finally bind either the principal or the adverse party; that there can be no contract unless and until both parties actually or impliedly express simultaneous assent; that the assent expressed by the adverse party at the time of the original transaction must be considered as continuing until withdrawn; that the only effect of the assent expressed by the unauthorized agent is to meet the expressed assent of the adverse party with an expression which may ultimately be adopted by the assumed principal, and which, meanwhile, prevents the expressed assent of the adverse party from expiring by lapse; that before ratification the expressed

assent of the adverse party may be withdrawn; that the withdrawal must be communicated either to the unauthorized agent or to the assumed principal; that ratification cannot be effective unless it precedes such communication; and that, subject to these limitations and to the general rule forbidding the doctrine of relation to be so applied as to work injustice, ratification relates back and causes the original transaction to be efficient as of its original date.

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